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No. 595

In the

Supreme Court of the United States

OCTOBER TERM, 1962

W. S. WELCH, Individually and d/b/a WELCH TRUCKING COMPANY and LOUIS DEE WHORTON,

Petitioners,

v.

GLEN RUNGE, Individually and as Next Friend for ROLLIN RUNGE, a Minor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUBJECT INDEX

	Page
Opinion of the Court Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	4
Statement	5
Reasons for Granting the Writ	9
Conclusion	23
Appendix A:	
September 18, 1962 Opinion of Court of Appeals	25
Appendix B:	
September 18, 1962 Judgment of the Court of Appeals	31
Appendix C:	
October 11, 1962 Opinion and Order Denying Rehearing	33

Cases	Page
Byrd v. Blue Ridge Rural Electric Co-op., 78 Sup. Ct. 893, 356 U. S. 525, 2 Lawyers Edition 2, 953	18
Carter v. John Hennes Trucking Co., 7th Cir., 210 F. 2d 443	16
Couch v. Donahue, 5th Cir., 259 F. 2d 352	17
Dallas Ry. & Terminal Co. v. Stewart, Tex. Civ. App., 128 S. W. 2d 443	16
Duncan v. Magette, Tex. Sup., 25 Tex. 245, 253	23
Ellis v. Clifton, Tex. Civ. App., 245 S. W. 2d 375	12
Erie R. Co. v. Tompkins, 304 U. S. 64	16
Fort Worth & Denver City R. R. Co. v. Rowe, Tex. Civ. App., 69 S. W. 2d 169	15
Ft. Worth & Denver City R. R. Co. v. Bozeman, Tex. Civ. App., 135 S. W. 2d 275, 280-281	15
Gibson v. Phillips Petroleum Company, 352 U. S. 874; 77 Sup. Ct. 16; 1 Lawyers Edition 2d 77	19
Guaranty Trust Co. v. York, 320 U. S. 99	16
Horton & Horton v. House, Tex. Com. App., 29 S. W. 2d 984	16
E. G. Ives v. Grand Trunk Ry. Co., 63 Sup. Ct. 1077; 319 U. S. 372	18
Johnson v. Empire Machinery Company, 5th Cir., 256 F. 2d 479	11
LeMaster v. Fort Worth Transit Co., Tex. Sup., 160 S. W. 2d 224, 226	13
Loughry v. Hodges, Tex. Civ. App., 215 S. W. 2d 669, 673	14
Mandro v. Vibbert, 170 F. 2d 540	17
Parker v. Jakovich, Tex. Civ. App., 115 S. W. 2d 790	16

Page

Russell v. Todd, 309 U. S. 280 16

Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608 18

Swafford v. Atlantic Coast Line R. R. Co., 350 U. S. 807; 76 Sup. Ct. 80; 100 Lawyers Edition 725, reversing 5th Cir., 220 F. 2d 901 19

Thweatt v. Ocean Acc. & Guarantee Corp., Tex. Civ. App., 62 S. W. 2d 250 16

Union Trust Co. v. Eastern Air Lines, Inc., 350 U. S. 907; 76 Sup. Ct. 192; 100 Lawyers Edition 796, reversing 95 U. S. App. D. C. 189; 221 F. 2d 62 19

Wichita Royalty Co. v. City National Bank, 306 U. S. 103 16

Wichita Valley Ry. Co. v. Minor, Tex. Civ. App., 100 S. W. 2d 1071, 1073 15

Williams v. Carolina Life Insurance Co., 348 U. S. 802; 75 Sup. Ct. 30; 99 Lawyers Edition 633, reversing 5th Cir., 210 F. 2d 477 19

Constitution

Seventh Amendment 4

Statutes

28 U. S. C., Sec. 1254(1) 2

28 U. S. C., Sec. 1652 4, 16

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To the Honorable Chief Justice of the United States and The Associate Justices of the Supreme Court of the United States:

Your Petitioners, W. S. Welch, individually and d/b/a Welch Trucking Company, and Louis Dee Whorton, pray that a Writ of Certiorari issue to review the judgment of

the United States Court of Appeals for the Fifth Circuit, entered in the above cause on September 18, 1962.

Petition for Rehearing was denied on October 11, 1962.

I.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 176), printed in Appendix A hereto, infra, page 25, is not yet reported.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 18, 1962 (R. 183), and is printed as Appendix B hereto, infra, page 31. Rehearing was denied on October 11, 1962 (R. 217; Appendix C, page 33, infra).

Jurisdiction is invoked under 28 U. S. C., Section 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether this Honorable Court will exercise supervision over a Court of Appeals which, in a diversity of citizenship case, has disregarded the verdict of a jury, amply supported by the evidence, and has substituted its judgment for that of the jury?

2. Whether this Honorable Court, in a diversity of citizenship case, will exercise supervision over a Court of Appeals which has applied substantive law in direct conflict with the law and applicable local decisions of the state from which the case was appealed?

3. Whether this Honorable Court, in a diversity of citizenship case, will exercise spervision over a Court of Appeals which has rendered a decision in direct conflict with another decision by the same Court of Appeals, both of which were appealed from the same state and involve substantially similar facts *and the identical question of law?*

4. Whether this Honorable Court, in a diversity of citizenship case, will permit a Court of Appeals to apply one rule of law for plaintiffs and another rule for defendants in determining the sufficiency of evidence to require the submission of the identical question to the jury in substantially similar cases from the same identical state?

5. Whether this Honorable Court, in a diversity of citizenship case, will exercise supervision over a Court of Appeals which fails to follow the applicable decisions of this Honorable Court which require the jury to pass on disputed questions of fact?

6. Whether this Honorable Court, in a diversity of citizenship case, will exercise supervision over a Court of Appeals which accepts as true the testimony of an interested witness when such testimony is contradicted, and is, itself, susceptible of more than one interpretation, and relates to a term, i.e., "following too closely," which is uni-

versally treated as a flexible term, the effect of which must be determined by the jury under the evidence.

7. Whether this Honorable Court, in a diversity of citizenship case, will exercise supervision over a Court of Appeals when such court applies diametrically opposed rules of law to the same facts in two different cases appealed from the same state, resulting in absolute uncertainty and confusion for trial courts and practicing attorneys?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Constitutional provision involved in this case is the Seventh Amendment to the Constitution of the United States reading as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U. S. C., Sec. 1652, which reads as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

V.

STATEMENT

This suit was brought in the United States District Court for the Western District of Texas, El Paso Division, by Respondent Glen Runge on behalf of his minor son against Petitioner W. S. Welch, an individual trucking contractor, and Petitioner Louis Dee Whorton, his employee-truck driver, seeking damages for personal injuries allegedly sustained by the minor when the automobile in which the minor was riding collided with an "L" shaped piece of pipe about eleven inches long and two inches and three inches in size (R. 89) which had fallen from Petitioners' truck upon the highway along which the Respondent vehicle was traveling. Jurisdiction was invoked because of the diversity of citizenship between Respondent, a citizen of Michigan, and Petitioners, citizens of Texas (R. 1-6).

The basis upon which Respondent sought recovery was the alleged negligence of Petitioners in placing the pipe on Petitioners' truck in such a manner that it could fall to the pavement, failure to inspect the truck for loose pieces of pipe, failure to tie down the pipe so it would not fall, and failure to warn the following traffic that the pipe might fall (R. 141-144).

Petitioners alleged, among other things, that the accident was caused solely by various acts of Henry Williams, who was driving the Chevrolet car in which Respondent and his minor son were riding (R. 7-10).

The evidence was sharply conflicting. Petitioners' theory was that the small piece of pipe (known as a swedge) had fallen from the tray or tool box, where it was customarily carried, while the truck was traveling down a smooth, paved highway at a normal and legal speed (R. 94). There was no explanation of how the swedge escaped from the tray or tool box (R. 94-95). It was unusual in that the truck had traveled much rougher terrain earlier and the swedge had not fallen (R. 91). Petitioner Whorton learned of the loss of the swedge after he had traveled about a mile down the road, when a yellow Buick car pulled up beside him and the occupants advised him of the loss (R. 91). Whorton testified this Buick had been following him for about eight miles at a distance of about one-fourth mile to his rear (R. 92). Whorton turned his truck around and came back, and just as he arrived he saw Respondent's car pull off the road (R. 92-93). This was just after the accident had occurred when Henry Williams drove over or on the swedge.

Respondents' theory was that the driver of the plaintiff-car was following defendant-truck at a distance of seventy-five feet to one hundred feet or *closer* at an *estimated* speed of fifty-five to sixty miles per hour when the swedge fell in front of the car (R. 39-40-46-47), and the driver was traveling *so close* to the truck he could not avoid it (R. 47), and he hit the swedge causing the accident.

The critical testimony determinative of the questions presented by this Petition is quoted in part for absolute clarity.

Plaintiff Runge testified:

"Q. All right, sir. Now then, at what speed did you say Mr. Williams was traveling?

"A. Oh, between, I would say between fifty and sixty miles an hour.

"Q. When I took your deposition you said sixty, have you changed your mind about it?

"A. No, sir. I wasn't anywhere where I could see the speedometer in the car, *I merely have to judge.*" (R. 24. (Emphasis mine.)

"Q. Now, about what distance was Mr. Williams following this truck, if you know, please, sir?

"A. Oh, I would say between four and five hundred feet.

"Q. Four and five hundred feet?

"A. *Approximately*, yes." (R. 24.) (Emphasis mine.)

The driver of the plaintiff car, Henry Williams, was a vitally interested witness because he himself had a lawsuit arising from the same accident (R. 51-52). He testified:

"Q. Yes, sir. And how far away from the back end of the truck were you when you saw this pipe fall off of it, approximately?

"A. Well, sir, I'd say seventy-five or a hundred foot, *approximately, maybe closer*, but I was a pretty good distance behind him there." (R. 40.) (Emphasis mine.)

* * * * *

"Q. Well, just answer me what your distance was, Mr. Williams, if you will, please, sir?

"A. Well, sir, I can give you an *estimate* of it, *I estimate it between seventy-five and a hundred feet.*" (R. 46-47.) (Emphasis mine.)

* * * * *

"Q. All right. Now, how fast were you going when you were coming along there?

"A. *Approximately* fifty-five and sixty, it would vary between there." (R. 48-49.) (Emphasis mine.)

* * * * * *

"Q. All right. Now, you were traveling *so close* that when you saw this object you couldn't do anything about it, could you?

"A. Well, sir, if it hadn't been under—if the vehicle hadn't been right there coming on to me, I could have, but the way the circumstances was, there wasn't anything I could do about it." (R. 47.) (Emphasis mine.)

* * * * * *

"Q. How long had you been *following this truck?*

"A. Well, sir, we had just pulled right up there waiting for this other vehicle, to get around him, on this little hill up above there, and I would have passed him as soon as we got around that, *but I had to follow him a ways because there was another vehicle coming.*" (R. 39.) (Emphasis mine.)

Plaintiffs' witness Webster testified:

"Q. When you were coming towards the truck, did you notice an automobile following the truck?

"A. I did.

"Q. *About* how far was it from the truck?

"A. *About three or four car lengths.*

"Q. *Three or four car lengths?*

"A. *Yes, sir.*" (R. 59.) (Emphasis mine.)

* * * * * *

"Q. So, you don't remember whether it fell off the truck or not?

"A. Well, I remember he had a *bunch of junk on the back of his truck.*

"Q. What kind of junk did he have on the back of his truck?

"A. I don't remember. But, I remember he had a *bunch of stuff piled up there.*" (R. 65.) (Emphasis mine.)

Based upon this testimony the trial court submitted the following charge:

"You are instructed that if you find and believe from a preponderance of the evidence that Henry Williams was following the truck too closely on the occasion in question, and if you further find and believe from a preponderance of the evidence that such following too closely, if any, was the sole proximate cause of the accident in question, then and in that event your verdict will be for the defendants."

The jury subsequently returned a verdict for Petitioners-Defendants, and judgment was duly entered thereon (R. 163-164). From such judgment the Respondents appealed to the Court of Appeals for the Fifth Circuit, which court ignored the quoted testimony (ante) and disregarded the verdict of the jury and reversed and remanded the cause (R. 174).

VI.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court of Appeals is in direct conflict with a previous decision of the same court by the same Circuit Judge involving the same lawyers and tried by the same District Judge.*

In the face of the previously quoted admissions by the interested witness Williams that he was "*traveling so close*"

that when he saw the object he couldn't do anything about it; that he was only seventy-five feet behind the truck and "*maybe closer*;" that he was traveling as much as sixty miles per hour (which would mean eighty-eight feet per second and give him less than one second to take evasive action); and, in spite of the quoted testimony of Respondents' own witness Webster that Williams was following within "*three or four car lengths*" of the truck (and no estimate of a car length ever made by such witness); and that the back of the truck was piled up with junk, the Court of Appeals has held as a *matter of law* that such evidence presented no issue of following too closely. The Court of Appeals has said:

> "We agree with the plaintiff that *the evidence presented no issue of following too closely*. There was no evidence or indication that the collision occurred in any manner other than one of the two conflicting versions. The Williams' automobile was not following too close according to either version. Certainly it was not too close if it was a mile or more behind the truck when the union or pipe fitting fell out. *Nor was it too close if it had just pulled up to 75 or 100 feet behind the truck preparatory to passing.* There was no evidence of any such excessive speed or of traffic upon or condition of the highway, *or other circumstances, from which the jury could reasonably infer that under either version the Williams' automobile was following the truck too closely.*" (Emphasis mine.) (Appendix A, infra, Page 25.)

Not only does the opinion plainly ignore that Williams was "maybe closer" than seventy-five feet, that other testimony showed the car within three or four unexplained car lengths, that Williams admitted "following a ways", that *all* distances and speeds were *estimates*, and that Runge's own

estimate of being five hundred feet behind the truck cast suspicion upon all the testimony of the plaintiff-witness, but it is directly contrary to the stated opinion of the same Circuit Court and same Circuit Judge in the case of *Johnson v. Empire Machinery Company, 256 Federal 2d 479*, tried by the same lawyers before the same trial judge, where it is said:

> "Appellee argues with must force that, upon the present state of the record, such refusal was not error. The appellant testified that his automobile had been stopped for more than 'about two or three seconds' before the collision. No evidence directly to the contrary was admitted. Appellee's driver, in his testimony *before the jury*, was not asked on cross-examination or otherwise anything about following appellant's automobile too closely. In such a state of the record, appellee insists that the specific issue was abstract, and that the district court did not err in refusing plaintiff's special charge 4.
>
> "In his testimony before the jury, Cooper *estimated* the speed of defendant's pickup truck at thirty miles an hour. He testified to no slowdown until immediately before the accident when he applied the brakes and left skid marks of some fifteen to twenty feet. The Texas statute, Section 61(a), Article 6701d, Vernon's Ann. Civ. St. provides:
>
> " 'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles, and the traffic upon the conditions of the highway.'
>
> "The weight and credibility of appellant's *estimate* of the time that his automobile had been stopped, of Cooper's *estimate* of his speed, and of all of the other evidence in the case were *matters for the jury's consideration. The issue of driving too closely could not*

properly be withdrawn from the jury, and the court erred in refusing plaintiff's special charge 4, and in failing and refusing to instruct the jury on that issue." (Emphasis mine.)

If ever there was a situation in which Rule 38, Sec. 5(b) is applicable, it must surely be when the *same* Circuit Judge writes conflicting opinions on the same question of law, involving the *same* lawyers and the *same* trial judge.

2. *The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas or the Courts of Civil Appeals of Texas.*

(A) The Court of Appeals has held as a matter of law that following at a speed of *fifty-five to sixty miles per hour* at a distance of *seventy-five feet or less* is *NO EVIDENCE* of following too closely or of negligence, and that the jury could not infer or conclude that such was negligence. The opinion states:

> "There was no evidence from which the jury could reasonably find either that Williams was negligent in 'following the truck too closely,' or that his doing so constituted the sole proximate cause of the collision." (Appendix A, infra, Page 25.)

Compare this holding with that by the Court of Civil Appeals of Texas in the case of *Ellis v. Clifton, 245 S. W. 2d 375*, and you will find, not only a *direct conflict*, but *almost the identical speeds and distances*. The Court there said (P. 376):

> "(1, 2) We are of the opinion that the evidence is sufficient to show negligence on the part of appellant in driving at an excessive rate of speed under the circum-

stances and in *following appellee's car more closely than was reasonable and prudent.* In fact, we are inclined to think that *the testimony of appellant alone, to the effect that he was driving 50 or 55 miles per hour and following appellee's automobile at a distance of 60 or 70 feet, would be sufficient for the trial court, under the circumstances, to conclude that he was negligent.*" (Emphasis mine.)

Compare the holding of the Court of Appeals also with these words of the Supreme Court of Texas in *LeMaster v. Fort Worth Transit Co., 160 S. W. 2d 224, 226:*

"(5, 6) It is not possible for this Court to define to an absolute certainty the kind and quantity of evidence that is sufficient in law to show either negligence or contributory negligence. Every negligence case differs in some respects from every other negligence case. The trial court gave the usual charge defining ordinary care and negligence. *The rule is that, if the evidence is conflicting, the jury must decide the conflict; and if the evidence is not conflicting, but reasonable minds might differ as to its effect, still a fact issue is presented.*" (Emphasis mine.)

* * * * *

"There is evidence in this record tending to show that LeMaster was driving his car too fast and too close to the rear end of this bus. Also, this record contains evidence tending to show that LeMaster ran his car into the rear end of this bus while it was stopped at the proper place, and in spite of the fact that it came to such stop gradually, after it had given full warning that it was doing so. *This evidence, however, was not conclusive. It merely contradicted LeMaster's testimony, and therefore presented fact issues for the jury.*" (Emphasis mine.)

This Court has many times granted its Writ for much less conflict than is shown here.

(B) The Court of Appeals in this case has accepted as true the testimony of the interested witness Williams when the court holds *as an established fact* that the plaintiff vehicle was *seventy-five feet* behind the truck, and had *"just pulled up" to pass.* Not only was Williams an interested witness, but this very testimony was *admittedly* an *estimate* (R. 46-47), which the Court of Appeals *accepted as exact.* It could not be said that such testimony was free from doubt in the light of the testimony of Runge and Webster which contradicted it, and in the light of the proof that Williams *was a convicted felon and thief.* In accepting the Williams testimony as true, the Court of Appeals is in direct conflict with the rule of law in Texas that the testimony of an interested witness raises no more than a jury issue. (It is almost universally accepted that the credibility of an interested witness is for the jury.) The Texas rule is succinctly stated in *Loughry v. Hodges, Tex. Civ. App., 215 S. W. 2d 669, 673 (Writ of Error Refused by Supreme Court of Texas, No Reversible Error):*

> "In Cochran v. Wool Growers Central Storage Co., 140 Tex. 184, 166 S. W. 2d 904, 908, this language is used: 'It is the general rule that the testimony of an interested witness, such as a party to the suit, though not contradicted, does no more than raise a fact issue to be determined by the jury'."

Whether Williams *in fact* was only seventy-five feet behind the truck, and whether *in fact* he was going only sixty miles per hour was for the jury, and the Court of Appeals in this case is in conflict with practically all courts in the United

States when it declares the clouded testimony of an interested witness as unequivocally true and an established fact.

(C) The Court of Appeals has declared a completely erroneous proposition of law in direct conflict with local law when it holds that *the sole proximate cause of an event must be negligence*. The opinion states:

> "For his conduct in 'following the truck too closely' to be a defense, it must have been conduct which the defendants could not reasonably have foreseen, *that is it must have been negligent*, and, further, it must have been such negligence as constituted the sole proximate cause of the collision." (Emphasis mine.) (Appendix A, infra, Page 25.)

This pronouncement of law by the Court of Appeals is absolutely contrary to Texas law as stated in the case of *Wichita Valley Ry. Co. v. Minor, Tex. Civ. App., 100 S. W. 2d 1071, 1073:*

> "It is a well-recognized rule of law that one person may not be held liable for damages caused solely by the act of another over whom he has no control. We understand that the authorities in this state establish the proposition of law that an independent act of a third party *may, but does not necessarily have to be negligence in order to be the sole cause of an injury* and therefore constitute a defense in cases of this character."

Such pronouncement by the Court of Appeals also conflicts with these additional Texas cases to the same effect:

Ft. Worth & Denver City R. R. Co. v. Bozeman, Tex. Civ. App., 135 S. W. 2d 275, 280-281;

Fort Worth & Denver City R. R. Co. v. Rowe, Tex. Civ. App., 69 S. W. 2d 169;

Dallas Ry. & Terminal Co. v. Stewart, Tex. Civ. App., 128 S. W. 2d 443;

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Thweatt v. Ocean Acc. & Guarantee Corp., Tex. Civ. App., 62 S. W. 2d 250;

Horton & Horton v. House, Tex. Comm. App., 29 S. W. 2d 984.

Since the Court of Appeals did not follow the law of Texas, a typical situation is presented where this Honorable Court has on many occasions granted its Writ:

Erie R. Co. v. Tompkins, 304 U. S. 64;

Russell v. Todd, 309 U. S. 280;

Wichita Royalty Co. v. City National Bank, 306 U. S. 103;

Guaranty Trust Co. v. New York, 320 U. S. 99;

See also *Rules of Decision Act, U. S. C., Section 1652.*

3. *The Court of Appeals in this case is in direct conflict with all other Courts of Appeals.*

In this case the Court of Appeals has failed to apply the universal rule of all Courts of Appeals that in determining questions of evidence, such questions must be viewed in the light most favorable to Appellees, and to this end the Appellees are entitled to the full effect of every inference from the evidence presented which reasonably minded men might deduce. *Carter v. John Hennes Trucking Co., 7th Cir., 210 Federal 2d 443*, and other cases too numerous to mention.

Here the Court of Appeals has held that the testimony of an interested convict (Williams) as heretofore quoted (ante pp. 7-8) is of such import that reasonable minds could not draw an inference or conclusion therefrom, and could not *deduce* that such a convict witness (with a big lawsuit of his own arising from the same accident) might fudge in his description of the accident, and just might be human enough to give a description most favorable to himself.

Further conflict is shown with another Fifth Circuit opinion when "following too closely" is treated by the Court of Appeals as an exact and not a flexible term. *Couch v. Donahue, 259 Federal 2d 325;* and with other circuits as in *Mandro v. Vibbert, 170 Federal 2d 540.*

4. *The action of the Court of Appeals constituted an invasion of the province of the jury contrary to the Seventh Amendment of the Constitution of the United States and completely deprived Petitioners of their right of trial by jury.*

The testimony quoted (ante pp. 7, 8) from Respondents and their own witnesses clearly raises the issue of following too closely, and when the Court of Appeals says that such critical testimony is *NO EVIDENCE*, it completely destroys the Petitioners' right of trial by jury and permits the Court of Appeals to substitute its judgment, deductions, inferences and conclusions for that of the jury.

Whether *in fact* Williams was traveling at the speed he claimed, and whether *in fact* he was following at the distance he claimed were questions that only a jury could determine

based on the facts and circumstances and the credibility of the witness. No Court of Appeals should be permitted to say that the testimony of any witness is absolutely and unequivocally true when such witness is interested in the outcome and his credibility thoroughly impeached. To permit such action would be the equivalent of trying cases by written statements and *deny the jury the right to form opinions based on observations of the attitude, appearance and demeanor of the witness*—not to mention the motives which prompt him to testify as he does.

Further, the Court of Appeals has taken the flexible term "following too closely" and used it as if it were a slide rule. The term "following too closely" is at best a synonym for negligence and at worst a nebulous phrase. It is impossible for it to be construed as susceptible of only one conclusion, inference or deduction, even when the evidence is undisputed. But, here, to further aggravate the situation, the evidence relating to it was varied, conflicting, estimated and highly disputed.

This Honorable Court has on many occasions revolted at such gross invasions of trial by jury and granted Writs of Certiorari. *E. G. Ives v. Grand Trunk Ry. Co., 63 Sup. Ct. 1077, 318 U. S. 372; Schulz v. Pennsylvania R. Co., 76 Sup. Ct. 134 and 608; Byrd v. Blue Ridge Rural Electric Co-Op., 78 Sup. Ct. 893, 356 U. S. 525; 2 Lawyers Edition 2, 953,* in which latter case this Honorable Court left no question open as to the function of the jury and the judge when Justice Brennan wrote:

> "The federal system is an independent system for administering justice to litigants who properly invoke

> its jurisdiction, and an essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, under the influence, if not the command of the Seventh Amendment, assigns the decision of disputed questions of fact to the jury."

And, this Honorable Court, for much less reason than shown here, has summarily corrected the Court of Appeals when it attempts to usurp the jury's function as in *Gibson v. Phillips Petroleum Company, 352 U. S. 874, 77 Sup. Ct. 16; 1 Law Edition 2d 77; Williams v. Carolina Life Insurance Co., 348 U. S. 802, 75 Sup. Ct. 30, 99 L. Ed. 633, reversing 5th Cir., 210 Federal 2d 477; Swafford v. Atlantic Coast Line R. R. Co., 350 U. S. 807, 76 Sup. Ct. 80, 100 L. Ed. 725, reversing 5th Cir., 220 Federal 2d 901; Union Trust Co. v. Eastern Air Lines, Inc., 350 U. S. 907, 76 Sup. Ct. 192, 100 L. Ed. 796, reversing 95 U. S. App. D. C. 189, 221 Federal 2d 62.*

And, this Honorable Court has never permitted the application of one rule of law to plaintiffs and another to defendants.

5. *The questions here presented have great importance; they affect litigants throughout the United States, and especially in the states under the jurisdiction of the Fifth Circuit. And, as to District Judges and lawyers trying lawsuits in the Federal Courts of Texas, an impossible situation has been created.*

(A) There must be literally thousands of cases on the dockets of the United States District Courts in which damages are sought for injuries resulting from rear-end col-

lisions and other similar occurrences. The rights of these litigants—be they plaintiff or defendant—should not be subjected to the caprice of a Court of Appeals which blithely withdraws from the jury a ground of recovery or defense (as the case may be) and declares its own interpretation of controverted, disputed and partisan evidence is superior to that of the jury, and thereby completely deprives some litigant of the right of jury trial.

(B) The issue of "following too closely" will be raised affirmatively or defensively in every rear-end collision case, and there should not be one rule in the state forum and another rule in the Federal Court.

(C) Because the phrase (and the issue) "following too closely" will appear in so many and varied cases, this Honorable Court should make it plain to all inferior courts that it is a flexible term for jury determination under the facts and circumstances, and particularly for the benefit of trial courts in the Fifth Circuit who now have the conflict between the case at bar and *Couch v. Donahue*, ante, and for the benefit of other circuits who also have the conflict between the case at bar and *Mandro v. Vibbert*, ante.

(D) In every collision in Texas involving two or more drivers wherein a minor is a passenger in one of the cars, the question of the actions of the driver of the car in which the minor is riding generally will be raised as the sole proximate cause, and in the State Court such driver's actions are not required to be negligent in order to constitute sole cause; whereas in the Federal Court such actions will be required

to be negligent to constitute sole cause, thus leaving a choice of forums with conflicting rules.

(E) Finally, and perhaps the inescapable reason for granting the Writ of Certiorari in this case is the state of confusion in which the United States District Judges of Texas and the trial bar of Texas now find themselves. If there is some semblance of testimony of "following too closely," a lawyer could read the case at bar and be *afraid to request a charge thereon, and the court would be afraid to submit it.* Yet, the same lawyer could read that *Johnson v. Empire Machinery Co.* case, infra, and, *on the very same evidence be afraid not to request a charge thereon and the court would likewise be afraid not to submit it.*

Consider the dilemma of the trial judge (who also tried the *Johnson* case), in event this case goes back for re-trial, and the evidence in the second trial varies slightly from the first trial and reveals the speed at sixty-one miles per hour and the following distance at seventy feet. Should the trial judge then submit the charge? Would the issue be raised when the speed reaches sixty-two? Sixty-three? Sixty-five? Or when the distance reduces to sixty-nine feet? Sixty-five feet? Or sixty feet? The position of trial court and lawyer is now impossible, and it is incredible that the Court of Appeals would leave the trial courts and the lawyers in a position of taking the calculated risk that the jury's verdict will later correspond with the verdict of the Court of Appeals—or, more specifically, the three judges who draw the case.

6. *The decision of the Court of Appeals was clearly erroneous.*

The decision reached by the Court of Appeals was clearly wrong (1) in its failure to apply the law of Texas, (2) in its treating the estimates of an interested witness as conclusive and binding on the jury, (3) in its mistreatment of a flexible term, (4) in its failure to adhere to the plain mandates of this Honorable Court in separating the functions of judge and jury, (5) in creating chaos and confusion for trial bench and bar, and (6) in depriving thousands of litigants of a ground of recovery or defense.

The weakness of the decision by the Court of Appeals and the right of Petitioners to relief can be no more clearly demonstrated than to point out to this Honorable Court that such decision cites no authority—state or federal—and is founded upon a point not assigned as error by the Respondents and not briefed by either side on original submission.

The first time that Petitioners had an opportunity to brief the point upon which the case was reversed was in connection with their Motion for Rehearing and at which time the error of the Court of Appeals was clearly pointed out. Unfortunately, the Petitioners' Motion for Rehearing and its brief in support thereof arrived in the Court of Appeals at a time when such Court was confronted with the many problems arising from the integration of the University of Mississippi. The writer suspects that the Court of Appeals had so much on its mind at that time that it could not give its usual careful consideration to Petitioners' problems in this case. This is not intended to be a criticism of the Court but more by

way of explanation of the Court of Appeals permitting its decisions to become so hopelessly conflicting. Petitioners feel, however, that they should not be deprived of their right of trial by jury because of a situation which they did not create and in which they were no way involved.

Nevertheless, the decision of the Court of Appeals brings to mind the words of Justice Roberts of the Supreme Court of Texas, who many years ago wrote:

> "Whoever undertakes to determine a case solely by his own notions of its abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law." *(Duncan v. Magette, 25 Tex. 245, 253.)*

The trial court correctly submitted the issues to the jury and his action should be summarily affirmed.

CONCLUSION

For the many reasons stated and demonstrated herein, this Petition for Certiorari should be granted.

Respectfully submitted,

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A separate certificate of service is being furnished to the Clerk upon filing this Petition in accordance with Rule 33 (3) (c).

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19459

GLEN RUNGE, Individually and as Next Friend for ROLLIN RUNGE, A Minor,

Appellants,

v.

W. S. WELCH, Individually and d b a WELCH TRUCKING COMPANY and LOUIS DEE WHORTON,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(September 18, 1962)

Before TUTTLE, Chief Judge, and RIVES and BROWN, Circuit Judges.

RIVES, Circuit Judge: This is a common-law action brought by a father individually and as next friend of his minor son to recover damages for personal injuries sustained by the minor.

Some of the facts are not in dispute. The father and son were guests or passengers in the back seat of an automobile driven by one Williams. The automobile was following some distance behind a tank truck driven by the defendant Whorton as employee of the defendant Welch. A union or pipe connection, made of two inch pipe on one end and three inch pipe on the other and the whole being some ten or eleven inches long, was carried in an open metal tray three inches deep located behind the truck cab and partly under the cargo tank. The union or pipe connection fell or was jolted out of the metal try onto the highway. There it come in contact with the underside of the automobile driven by Williams. According to Williams' testimony.

> "Q. What did it do to the bottom of your car?
>
> "A. Well, sir, it tore the front A-frame up, and it knocked the floorboards, it knocked them up, and it knocked the back floorboard up approximately five or six inches (indicating), and it went on back and it tore the muffler off, and the gas tank, and all. It went—well, the small piece of the object that fell was a two-inch because it just made a two-inch hole right in the bottom of my gas tank."

At the time of the accident no injury to the minor son was apparent. According to the father, the son complained of a knot on his head two or three hours later. There was evidence for the jury's consideration that severe mental and physical injuries then ensued.

The plaintiff's and the defendants' versions of how the collision occurred between the union or pipe connection and Williams' car are widely different. According to Williams,

he had just pulled up to a distance of 75 to 100 feet behind the truck and was waiting for an approaching vehicle to get by before passing the truck.

"Q. Mr. Williams, what was the first thing that you noticed concerning this swedge that fell?

"A. Well, it was just—it was coming right down when I seen it, it was coming off behind the truck there and it was coming down towards me, and I didn't have a chance to completely stop before I hit it, and I was waiting, I couldn't go ahead and pass the truck because there was another vehicle coming up there, and I was going too fast I didn't want to take a chance on pulling off the side of the road and hitting that sand, afraid of turning me over, there was nothing I could do but try to straddle it, it was right in front of me, I couldn't hardly miss, well, I didn't miss it."

According to the truck driver, Whorton, a yellow Buick in which some "roughnecks" were riding had been following about a quarter of a mile behind his truck for some eight miles, and "these roughnecks in this yellow Buick pulled up beside me and told me I lost something." Whorton turned around and came back. After traveling about a mile, he observed the Williams car "just pulling off the road."

"Q. What did you do then, after you saw them pull off there on the side of the road?

"A. Well, sir, I went on by them and turned around and stopped, and picked up the union, and pulled up there beside the car, behind the car, and this gentleman here (indicating) come to me up there and said I had knocked a hole in his gas tank.

"Q. All right. And what else was said, if anything, or what else happened?

"A. Well, sir, I asked him was anyone hurt or anything I could do, and he just turned around and walked off.

"Q. Did he appear to be happy, or angry, or mad, or what was the situation?

"A. Well, sir, he was pretty mad.

"Q. You figured you were better off to go down the road?

"A Yes, sir."

After a full trial, the jury returned a verdict for the defendants, and judgment was entered thereon. All of the grounds relied on for reversal relate to the court's charge to the jury. In most of the charges given for the defendants and in one refused to the plaintiff, we find no error. The following instruction, however, appears to us erroneous and so prejudicial as to require a reversal:

> "You are instructed that if you find and believe from a preponderance of the evidence that Henry Williams was following the truck too closely on the occasion in question, and if you further find and believe from a preponderance of the evidence that such following too closely, if any, was the sole proximate cause of the accident in question, then in that event your verdict will be for the defendants."

To that charge plaintiff's counsel objected as follows:

> "We further respectfully except to the charge of the Court and to the giving of the instruction on following too closely because the uncontradicted evidence—they claim that he was a mile back, their truck driver, by which they are bound; they are bound by that testimony, and two miles back, there couldn't have been any issue of following too closely, but even under our testimony, he gradually approached, under all the testimony, he was getting ready to pass him but couldn't pass him because of the presence of the other car. Now, to say that you can't get within seventy-five or a hundred feet

> of a car and have an accident happen because they let something fall off their truck, an entirely unheard of and unforeseen thing, is to create a very dangerous doctrine in Texas and one that I do not believe sincerely is sustained by any of the decisions of the courts."

The court overruled this objection.

We agree with the plaintiff that the evidence presented no issue of following too closely. There was no evidence or indication that the collision occurred in any manner other than one of the two conflicting versions. The Williams' automobile was not following too close according to either version. Certainly it was not too close if it was a mile or more behind the truck when the union or pipe fitting fell out. Nor was it too close if it had just pulled up to 75 or 100 feet behind the truck preparatory to passing. There was no evidence of any such excessive speed or of traffic upon or condition of the highway, or other circumstances, from which the jury could reasonably infer that under either version the Williams' automobile was following the truck too closely.

Any negligence on the part of Williams could not be imputed to the father and son riding as guests or passengers on the back seat. For his conduct in "following the truck too closely" to be a defense, it must have been conduct which the defendants could not reasonably have foreseen, that is it must have been negligent, and, further, it must have been such negligence as constituted the sole proximate cause of the collision. There was no evidence from which the jury could reasonably find either that Williams was negligent in "following the truck too closely," or that his doing so constituted the sole proximate cause of the collision.

There was, of course, no duty on Williams' part to anticipate that the union or pipe fitting, or any other foreign object, would fall or be thrown from the truck, and to follow at such distance as to be able to avoid any such object. Yet, without any explanation of what was meant by "following the truck too closely," the existence of some such duty could naturally be found by the jury from the court's charge. That is all the more true when we consider Williams' testimony on cross-examination:

> "Q. But you were following there so close that you couldn't avoid hitting that object?
>
> "A. Yes, sir, I couldn't avoid the object, I mean it was either hit the car or hit the sand out there and taking a chance on turning over, or try to straddle it, sir. I figure I—"

The jury could not reasonably infer from the collision itself that Williams was following the truck too closely. We can discover no other evidence to justify such a finding.

We cannot say that the general verdict for the defendants was not brought about by this erroneous instruction. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ CLARA R. JAMES
Deputy
New Orleans, Louisiana OCT 22 1962
(SEAL)

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1961

No. 19459

D. C. Docket No. 2140 Civil

GLEN RUNGE, Individually and as Next Friend for ROLLIN RUNGE, A Minor,

Appellants,

v.

W. S. WELCH, Individually and d/b/a WELCH TRUCKING COMPANY and LOUIS DEE WHORTON,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, Chief Judge, and RIVES and BROWN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, W. S. Welch, Individually and d/b/a Welch Trucking Company and Louis Dee Whorton, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 18, 1962

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19459

GLEN RUNGE, Individually and as Next Friend for ROLLIN RUNGE, A Minor,

Appellants,

v.

W. S. WELCH, Individually and d/b/a WELCH TRUCKING COMPANY and LOUIS DEE WHORTON,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(OCTOBER 11, 1962)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and RIVES and BROWN, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.